Office - Supreme Court, U
FILED
FEB 10 1956
HAROLD B. WILLEY, Cle

Supreme Court of the United States

October Term, A. D. 1955.

No. 627.

ELSIE S. FULLERTON,

Appellant,

vs.

CITY OF SCHENECTADY,

Appellee.

WALTER A. FULLERTON, JR.,

Appellant,

vs.

CITY OF SCHENECTADY,

Appellee.

Motion to Dismiss and Brief in Support Thereof.

CHARLES W. BROWN,
Attorney for Appellee,
Room 201, City Hall,
Schenectady 5, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1956

Subject Index.

Page

Motion to Dismiss 1

Statement of the Case 1

Argument 5

It is obvious that the questions sought to be reviewed do not present a substantial federal question and that the judgment of the Court below rests on an adequate non-federal basis 5

TABLE OF CASES CITED.

Curry vs. City of Buffalo, 135 N. Y. 366 10

Ellis vs. City of Geneva, 259 App. Div. 502, affd. 288 N. Y. 478 ..... 9, 10

Fullerton vs. City of Schenectady, 285 App. Div. 545, affd. 309 N. Y. 701; 309 N. Y. 855 ..... 3, 4

Golden vs. City of Rome, 277 App. Div. 832 10

MacMullen vs. City of Middletown, 187 N. Y. 37 9, 10, 11

Pasquale vs. City of Saratoga Springs, 250 App. Div. 808 10

Ross vs. City of Long Beach, N. Y. L. J., July 29, 1954 10

Snyder vs. Delmin Realty Corp., N. Y. L. J., November 18, 1954 10

STATUTES CITED.

Page

New York State Constitution:

Article IX, Section 12 5
Article IX, Section 13 6

City Home Rule Law, Section 11 6

Second Class Cities Law:

Section 244 6
Section 2 7
Section 4 7

General Municipal Law, Section 50-e 8

Local Law No. 6—City of Schenectady, New York 1, 2, 4, 5, 8

Judicial Code (Title 28 U. S. C.), Section 1257(2) 4

Supreme Court of the United States

October Term, A. D. 1955.

No. 627

ELSIE S. FULLERTON, Appellant, vs. CITY OF SCHENECTADY, Appellee.	
WALTER A. FULLERTON, Jr., Appellant, vs. CITY OF SCHENECTADY, Appellee.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, by its counsel of record, and moves that the appeal herein be dismissed.

Statement of the Case.

This appeal is from a final judgment of the Court of Appeals of the State of New York, which final judgment was duly entered in the Schenectady County Clerk's Office, State of New York, on December 5th, 1955. Said judgment sustained the validity and constitutionality of Local Law No. 6 of the City of Schenectady, effective April 16th, 1935.

The actions were originally brought in the Supreme Court, Schenectady County, State of New York, to recover damages for personal injuries sustained by appellant Elsie S. Fullerton, when she fell on a sidewalk on State Street in the City of Schenectady, New York on November 13th, 1951, and her husband, appellant Walter A. Fullerton, Jr., sued to recover for the damages he sustained as a result of the injuries to his wife.

The actions were based on negligence and the appellee raised the defenses that it was not negligent; that the appellant Elsie S. Fullerton was guilty of contributory negligence and that she had not given prior written notice of any alleged defect in the sidewalk to appellee, as required by Local Law No. 6 of the City of Schenectady.

The actions were tried together before Mr. Justice Gibson and a jury commencing on April 13th, 1954, and the jury rendered verdicts in appellants' favor in the total amount of $12,500.

During the course of the trial, appellee offered in evidence a certified copy of Local Law No. 6 which was duly objected to by counsel for the appellants, which objection was sustained by the Presiding Judge, which ruling was duly excepted to by appellee (fols. 550-552).

At the close of appellants' cases, appellee duly moved to dismiss the complaints on the ground that there was no evidence in the entire record of any written notice having been given to the City prior to the accident, as required by Local Law No. 6, which motion was denied by the Presiding Judge and duly excepted to by appellee (fols. 533-534).

At the close of the evidence, appellee renewed its motion to dismiss for failure to give prior written notice, which motion was denied and duly excepted to by appellee (fols. 552-553).

Appellee moved to set aside the verdicts of the jury on the ground that they were contrary to the law, which motion was denied and duly excepted to by appellee (fols. 592-593).

Appellant Elsie S. Fullerton did not, at any time prior to the accident, give any written or oral notice to the City of the alleged defective condition of the sidewalk (fol. 465).

Appellant Elsie S. Fullerton fell at about 4:10 P. M. and it was a nice clear day, the sun was shining, there was no rain or snow and the pavement was dry (fols. 21, 424, 433-434).

Appellee appealed to the Appellate Division of the Supreme Court, Third Department, and the judgments were reversed, on the law, and the complaints dismissed (fols. 676, 683, 686). The ground of the reversal and the dismissal of the complaints was based upon the conclusion of the Appellate Division that the local law, requiring prior written notice, was valid and constitutional and appellant's failure to give the City such prior written notice, was fatal to her cause of action (*Fullerton vs. City of Schenectady*, 285 App. Div. 545; fols. 685-703).

The appellants appealed to the Court of Appeals from the judgment of the Appellate Division and the Court of Appeals unanimously affirmed, without opinion, Burke, J., taking no part, the judgment of the Appellate Division (*Fullerton vs. City of Schenectady*, 309 N. Y. 701). The appellants moved the Court of Appeals for permission to re-argue the matter or, in the alternative, for an amendment to the remittitur for the purpose of showing that constitutional questions had been considered and passed upon by the Court of Appeals.

The Court of Appeals denied appellants' motion for re-argument, but granted their motion to amend the remittitur. The amended decision of the Court of Appeals, dated November 17th, 1955, was as follows:

> "Motion for re-argument denied.
>
> Motion to amend remittitur granted. Return of the remittitur requested and, when returned, it will be amended to read as follows: Judgment affirmed, without costs. Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether plaintiffs have been deprived of property without due process of law under the Fourteenth Amendment of the Constitution of the United States; and whether Local Law No. 6 of the City of Schenectady, effective April 16, 1935, is repugnant to the Constitution of the United States. The Court of Appeals held that there was no denial of any constitutional right of the plaintiffs. (See 309 N. Y. 701.)"

Fullerton vs. City of Schenectady, 309 N. Y. 855.

The appellants have appealed to this Court, pursuant to Title 28, United States Code, Section 1257(2). The Notice of Appeal to this Court, dated December 12th, 1955, and filed in the Office of the Schenectady County Clerk, State of New York, contends that Local Law No. 6 of the City of Schenectady, State of New York, effective April 16th, 1935, is repugnant to the Constitution of the United States and that there has been a denial of the constitutional rights of the appellants.

ARGUMENT.

It is obvious that the questions sought to be reviewed do not present a substantial federal question and that the judgment of the Court below rests on an adequate non-federal basis.

The only question involved is the validity and constitutionality of Local Law No. 6 of the City of Schenectady, duly adopted pursuant to the provisions of the New York State Constitution, the City Home Rule Law and the Second Class Cities Law of the State of New York.

It is conceded that the City of Schenectady is a second class city. It is not disputed that Local Law No. 6 is in proper form and was presented and lawfully adopted in the manner and form prescribed by the City Home Rule Law; nor is it disputed that on November 13th, 1951, the date of this accident, this local law was in force and effect (fols. 550-552).

Article IX, Section 12, of the New York State Constitution, so far as material, reads as follows:

> (Power of cities to enact local laws relating to property, affairs or government.)
>
> "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, *and whether or not such local laws relate to its property, affairs or government, in respect to the following subjects*: * * *, the transaction of its business, the incurring of its obligations, *the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property*, * * *.

The provisions of this article shall not be deemed to restrict or diminish the existing powers of any city."

Article IX, Section 13, of the New York State Constitution, so far as material, reads as follows:

(Existing laws to remain applicable; reservation of power in legislature over certain matters.)

"A. The provisions of this article shall not affect any existing provisions of law not inconsistent with this article; but all existing charters and other laws, so far as not inconsistent with this article, shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article.

B. * * *."

Section 11 of the City Home Rule Law, so far as material, reads as follows:

(Power of cities to adopt and amend local laws.)

"Subd. 1. Subject to the restrictions provided in this chapter, the local legislative body of a city shall have power to adopt and amend (a) local laws in relation to the property, affairs or government of the city and (b) * * *, the transaction of its business, *the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, * * *, whether such local laws relate to the property, affairs or government of such city or not. Such local laws may change or supersede any provision of an act of the legislature theretofore enacted which provision does not in terms and in effect apply alike to all cities.* * * *."

Section 244 of the Second Class Cities Law, so far as material, reads as follows:

"No civil action shall be maintained against the city for damages or injuries to person or property

sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed unless it appears that written notice of the defective, unsafe, dangerous, obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually given to the commissioner of public works, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair, or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless it appears that such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence. But no such action shall be maintained for damages or injuries to the person sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk or street, unless written notice thereof, relating to the particular place, was actually given to the commissioner of public works and there was a failure or neglect to cause such snow or ice to be removed, or the place otherwise made reasonably safe within a reasonable time after the receipt of such notice. * * *."

Section 2 of the Second Class Cities Law reads as follows:

Term city defined.

"The term 'city,' when used in this chapter, means a city of the second class."

Section 4 of the Second Class Cities Law reads as follows:

Application of chapter.

"A provision of this chapter shall apply, according to its term, only to a city of the state which on the thirty-first day of December, nineteen hundred

> and twenty-three, was a city of the second class, *until such provision is superseded pursuant to the city home rule law or otherwise changed, repealed or superseded pursuant to law.*"

Local Law No. 6 of the City of Schenectady, printed in full at pages 212-216 of "Record on Appeal," merely eliminated the provisions pertaining to constructive notice in Section 244 of the Second Class Cities Law and provided that no civil action could be maintained against the City of Schenectady for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe or dangerous unless it was made to appear that written notice of the defective condition was actually given to the Commissioner of Public Works at least twenty-four (24) hours previous to such damage or injury, and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.

Appellee contends that the written notice, required by Local Law No. 6, was merely a condition precedent to the maintenance of an action against the City and did not create anything new, for Section 244 of the Second Class Cities Law, in itself, provided that prior written notice was required where injuries were sustained as the result of snow or ice upon any sidewalk, crosswalk or street.

Conditions precedent to the maintenance of an action are not new and are contained in many statutes, including but not limited to Section 50-e of the General Municipal Law of the State of New York which, in part, states that:

> "In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, shall be given

within ninety days after the claim arises and must conform to the provisions set forth in said section."

The validity and constitutionality of requiring prior written notice as a condition precedent to the maintenance of an action against a city in the State of New York has long ago been decided and has been consistently followed and if said requirement, requiring prior written notice, be regarded as harsh and imposing too great a burden on litigants, the correction and remedy is not to be sought from the Courts but from the Legislature.

MacMullen vs. City of Middletown, 187 N. Y. 37 at page 47 (1907).

In the *MacMullen* case, *supra*, the Court further said at page 41:

> "The power to grant, or to deny, a remedy by private action for the breach of a duty, imposed upon it for governmental purposes, and to affix conditions, where the right to an action is given, is not one which should be called in question. * * *. The cases are numerous, which involved the right of a municipality to defeat the claims of a plaintiff, because of the failure to show notice, or knowledge, on its part of the conditions complained of and because of the failure to comply with statutory requirements of notice to municipal officers, before the commencement of an action."

A local law amending a city charter, requiring notice in writing prior to the accident in question, was held to be valid and constitutional and was a condition precedent which the plaintiff was required to plead and prove in order to maintain the action.

Ellis vs. City of Geneva, 259 App. Div. 502, affd. 288 N. Y. 478 (1942).

State laws, local laws and charter provisions, requiring prior written notice as a condition precedent to the

maintenance of an action against a municipality, have been held valid and constitutional, and that said requirement does not limit the duty of the city to maintain its streets in a reasonably safe condition for use by the public, nor relieve the city of the consequences of its own negligence.

MacMullen vs. City of Middletown, supra;
Ellis vs. City of Geneva, supra;
Pasquale vs. City of Saratoga Springs, 250 App. Div. 808;
Curry vs. City of Buffalo, 135 N. Y. 366;
Golden vs. City of Rome, 277 App. Div. 832;
Ross vs. City of Long Beach, N. Y. L. J., July 29, 1954;
Snyder vs. Delmin Realty Corp., N. Y. L. J., November 18, 1954.

The appellants, in the second paragraph on page 13 of their Jurisdictional Statement, admit that the law as to constructive notice in municipal cases may be changed by state legislative enactment. By this statement, appellants frankly admit that a state statute, requiring prior written notice, would not be repugnant to the Constitution of the United States and would not deprive a person of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. If the state can lawfully enact a statute requiring prior written notice, a municipality may do likewise with the same force and effect, pursuant to the Home Rule Provisions of the New York State Constitution and the City Home Rule Law, for, by these provisions, the state delegated to the cities the power to enact such legislation.

The Court, in *MacMullen vs. City of Middletown, supra,* said at page 41:

> "A municipal corporation is a political, or governmental, agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good."

The heavy weight of the authorities cited herein, in their direct application to the facts and contentions here present, seem to us to conclusively establish that the issues raised do not present a substantial federal question and that the judgment of the Court below rests on an adequate non-federal basis, not warranting further review.

We respectfully submit that the appeal herein should be dismissed.

Dated: February 6th, 1956.

CHARLES W. BROWN,
Attorney for Appellee,
Room 201, City Hall,
Schenectady 5, New York.